U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 25 2010

SRC 07 157 51399

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an IS/IT professional consulting services company.[1] It seeks to employ the beneficiary[2] permanently in the United States as a software engineer, applications, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750,[3] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner had not established that the beneficiary was qualified to perform the duties of the proffered position as it had not provided corroborating evidence to establish the beneficiary had a four-year bachelor's degree. The director also determined that the petitioner had not established its ability to pay the proffered wage as of the 2005 priority date and onward, as well as the salaries of other beneficiaries with pending I-140 petitions. The director accordingly denied the petition.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 1, 2007 denial, the two issues in this case is whether or not the petitioner has established its ability to pay the proffered wage as of the 2005 priority date, and whether it demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[4]

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[1] The record indicates the petitioner is a 51 per cent owned subsidiary of CDC, a Hong Kong company operating out of the Cayman Islands.

[2] The AAO notes that the petitioner filed a subsequent I-140 EB2 petition for the beneficiary with accompanying certified ETA Form 9089 with a priority date of November 11, 2007. The Texas Service Center approved this petition on February 10, 2010. In this petition, the petitioner established its ability to pay the proffered wage based on the beneficiary's wages during the relevant period of time that began in 2007.

[3] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

[4] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The AAO will first examine whether the petitioner has established its ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 11, 2005. The proffered wage as stated on the Form ETA 750 is $70,000 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary did claim to have worked for the petitioner prior to the filing of the instant petition. On the petition, the petitioner claimed to have an establishment date in 1984, an estimated $7 million dollar gross annual income and to currently employ more than 75 workers.[5]

In support of the petition, the petitioner submitted substantial documentation with regard to CDC, its claimed 51 percent majority owner. Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 1, 2007, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of its 2005 and 2006 tax returns to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also raised the question of multiple beneficiaries, stating that the petitioner had filed an additional four I-140 petitions and asking for evidence that the petitioner could pay both the difference between the beneficiary's actual wages and the proffered wage and the wages of all the other beneficiaries of other pending I-140 petitions.

In its response to the director dated May 17, 2007, the petitioner stated that it was submitting its 2005 and 2006 tax returns; however, only the petitioner's 2005 tax return is found in the record. The petitioner did not provide any further evidence with regard to multiple beneficiaries. The director determined that the evidence submitted did not establish that the petitioner had the continuing ability

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[5] In response to the AAO RFE, in a letter dated February 18, 2010, [redacted], the petitioner's human resources officer, stated that the petitioner currently had 44 employees, down from 75 employees when it filed the instant petition.

to pay the proffered wage beginning on the priority date for the beneficiary and the other beneficiaries of other pending applications, and, on June 1, 2007, denied the petition. The petitioner did submit copies of monthly bank statements for two businesses located at the petitioner's address.[6]

On appeal, counsel states that evidence previously submitted establishes the petitioner's ability to pay the proffered wage. Counsel states that the director's comments on multiple beneficiaries was a facetious statement, as it is well known that each petition stands on its own. Counsel provides no further evidence with regard to the proffered wages or actual wages of additional beneficiaries with pending I-140 petitions.

The AAO in its RFE noted that the petitioner's documentation on its 51 percent majority owner was not dispositive of the petitioner's ability to pay the proffered wage during the relevant period of time, and that this company, in its Form 20-F submitted to the record, states: "Our operating losses and net losses may increase in the future and we may never regain or sustain operation profitability or net profitability. We may continue to incur operating losses and post net losses, due to several factors." The AAO requested the petitioner's 2006 tax return. The petitioner submitted its incomplete tax returns for 2006 and 2007, without all the accompanying schedules and statements, stating that its 2006 tax return had not been filed at the time of the director's RFE request.

The tax returns reflect the following information for the following years:

	2005	2006	2007
Net income[7]	$152,566	$2,340,634	$940,105
Current Assets	$2,170,827	$ Unknown	$ Unknown
Current Liabilities	$2,290,982	$ Unknown	$ Unknown
Net current assets	-$120,155	$ Unknown	$ Unknown

[6] One set of bank statements is [redacted], another company acquired by CDC China. The other set of bank statements is for the petitioner.

[7] For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on May 18, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2006 federal income tax return was due; however, the petitioner now claims that as of the director's RFE, the petitioner's tax return for 2006 had not been filed. The petitioner submits its incomplete tax returns for 2006 and 2007. In response to the AAO RFE, counsel identifies the petitioner's net income as $795,816 in 2006 and $319,636. In tax year 2007, counsel's figure is line 13, of Form 4626, Alternative Minimum Tax-Corporations, regular tax liability. The petitioner's tax returns demonstrate its net income for tax years 2006 and 2007 as shown in the table above.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2005. The petitioner submitted W-2s to the record that indicate the petitioner paid the beneficiary the following wages in tax years 2006 through 2009: $62,458 in 2006; $102,004 in 2007; $105,984 in 2008; and $97,824 in 2009. Thus, the petitioner has established its ability to pay the proffered wage in tax years 2007 to 2009. However, it has to establish its ability to pay the entire proffered wage of $70,000 in 2005, the priority date year, and its ability to pay the difference between the beneficiary's actual wages of $62,458 in 2006 and the proffered wage of $70,000.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[8] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner has not demonstrated that it paid the full proffered wage. In 2005, the petitioner shows a net income of only $152,566, and negative net current assets of -$120,155. The petitioner would have to utilize more than half of its net income in 2005 to pay the proffered wage. Contrary to counsel's assertion, the director's question with regard to multiple beneficiaries was not facetious. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

USCIS records indicate that the petitioner has filed 92 I-129 or I-140 petitions since approximately 2003, the year in which the petitioner was acquired by CDC China. This number of petitions includes 69 I-129 petitions, and 23 I-140 petitions. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the 2005 priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. The petitioner has not provided any further evidence or information on the four additional I-140 petitions referenced by the director in her decision with regard to their proffered wages and actual wages. Thus, the AAO cannot determine if the petitioner in tax year 2005 was able to pay the difference between the beneficiary's actual wages and the proffered wage and the wages of other beneficiaries with pending I-140 petitions.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Counsel's reliance on the business checking account balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on

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[8] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Schedule L considered above in determining the petitioner's net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2005 or subsequently during 2006.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner indicates on its tax return that it was established in 1993. Other documents in the record indicate it was acquired by another company in 2003. The documentation in the record exclusively focuses on the petitioner's majority owner's extensive business operations and acquisitions, as opposed to the petitioner's business operation. With regard to gross receipts the petitioner's tax returns indicate the petitioner had gross receipts of $8,957,279 in 2005; $18,393,679 in 2006; and $20,113,937 in 2007. The record also indicates that in the last quarter of 2006 the petitioner had 64 employees, while [redacted] states in 2010 that the petitioner currently employs 45 employees.

With regard to level of wages, the petitioner's tax returns indicate $649,753 in wages in 2005, with no wages and salaries noted in tax years 2006 and 2007.[9] Thus, assessing the totality of the circumstances in this individual case, the petitioner has significant gross receipts in particular in tax year 2006 and 2007, with the majority of its labor expenses paid to subcontractors. The record has no evidence as to the petitioner's reputation within the software consulting field, nor does the record reflect any other business operations besides paying contractors to do computer consulting services.

Further, the petitioner provides no further explanation for its increase in gross profits in 2006. It is concluded that the petitioner has not established that it is a viable business with the continuing ability to pay the proffered wage.

The Beneficiary's Qualifications for the Proffered Position

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Eligibility for the Classification Sought

As noted above, the ETA 750 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B.*

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[9] The petitioner's Schedules A for tax years 2005, 2006 and 2007 indicate cost of labor at line 3 as $4,526,499, $11,274,873 and $11,766,627, respectively. Line 5 of the Schedules A indicates other costs of $1,913,521, $2,790,912 and $2,822,275 for tax years 2005 to 2007. Although the petitioner did not submit its schedules and statements for its 2006 and 2007 tax returns, based on its Schedule A of the 2005 tax return, the figures at line 5 are primarily for subcontracted labor.

v. Askkenazy Property Management Corp. 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree or a two year HND will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[10] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Compare*

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[10] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

The beneficiary on the ETA Form 750 indicated that he had obtained a bachelor of technology from JNTU College of Engineering, Kakinada, India, studying mechanical engineering, from August 1984 to June 1988. The petitioner submitted an educational equivalency report to the record from International Educational Evaluations, Inc., dated April 24, 2007. In its RFE, the AAO noted that the record did not contain the beneficiary's transcripts or statement of marks from his postsecondary studies to establish his field of study or that his university level studies were for four years. In its response, the petitioner submitted a copy of the beneficiary's Statement of Marks for his four-year program in Mechanical Engineering from Jawaharla Nehru Technological University, JNTU College of Engineering at Kakinada, India.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). The AAO finds that the IEE evaluation is corroborated by the beneficiary's diploma and transcripts submitted in response to the AAO RFE.

Thus, the petitioner has established that the beneficiary has a four-year foreign equivalent degree to a U.S. baccalaureate degree in computer science or engineering. Thus the petitioner has established that the beneficiary is eligible for the classification based on his academic credentials. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b),

> 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education: Grade School: X; High School: X, College: X

College Degree Required: Master's *
Major Field of Study Comp. Sc., Engg.

Experience: 3 years in the proffered position, or three years in the related field of computer software developing and/or consulting.

Block 15: Technologies used: J2EE EJB, ZML, HTML, MQ Series, Rational Rose, JUNIT, Struts Framework, MVC Architecture, Log4J, JSP, RUP, SQL, PL/SQL. *Will accept Bachelor's degree and 6 years of experience in lieu of Master's degree and 3 years of experience.

The job duties listed on the ETA Form 750 are as follows: "Analyze, design, develop, test, debug, modify, enhance, implement and integrate computer software applications in an RDBMS (e.g. Oracle, SQL Server) using J2EE, EJB, XML, HTML, MQ Series, Rational Rose, JUNIT, Struts Framework, MVC Architecture, Log4J, JSP, RUP, SQL, PL/SQL. Work under direct supervision of a manager."

On the section of the labor certification eliciting information of the beneficiary's work experience, the beneficiary listed his work experience as follows:

Job One
[redacted]
May 2004 to December 29, 2004 (The date he signed the Form ETA 750)
Senior Software Engineer (Applications)

Job Two
[redacted]
September 2000 to April 2004
Systems Analyst

Job Three
[redacted]
December 1995 to September 2001
Systems Consultant

Job Four
[redacted]
June 1990 to December 1995
Assistant Engineer

The petitioner also submitted the following letters of work verification:

A letter of work verification from Bearing Point dated February 28, 2007. This verification is computer-generated, with no person signing the form. The actual job duties of the beneficiary are not listed, although the job title is identified as Senior Consultant;

A letter from [redacted] the petitioner's Human Resources Director, Fairfield, New Jersey. This letter verifies that the beneficiary worked for the petitioner from September 2000 to April 2004 as a systems analyst and that during his employment, the beneficiary worked in all the technologies listed on the Form ETA 750;

A letter from [redacted], dated July 12, 2000. [redacted] states that the beneficiary worked for the company since December 1995, and that the beneficiary successfully developed software projects, involving programs such as COBOL, Java Script HTML, JDBC, and Oracle 7.x. None of the technologies stipulated on the Form ETA 750 are identified in this letter; and

A letter from [redacted], dated December 29, 1995. The letter writer certifies that the beneficiary worked from June 28, 1990 to December 17, 1995 as Assistant Engineer (Mechanical) in the operations and maintenance wing of the Viyayawada Thermal Power Station.

In its RFE, the AAO noted that, based on the letters of work verification submitted, the petitioner described three years and seven months of work experience utilizing the specific technologies described in Section 15, Form ETA 750, and thus, the record did not establish that the beneficiary has the requisite six years of work experience utilizing the specific technologies outlined in Section 15. In response to the AAO's RFE, counsel submitted four new notarized letters of work verification with regard to the beneficiary's employment with Citation Computer Consultants, Hyderabad, India, and also with BearingPoint in the United States.

The AAO notes that, based on the further evidence submitted to the record, the petitioner has established that the beneficiary has a master's degree in engineering. Thus, the petitioner has to only establish that the beneficiary possesses three years of relevant work experience in the proffered position or in the related field of computer software developing and/or consulting, as stipulated on the ETA Form 750. The letters of work verification submitted with the initial petition as well as the additional letters of work verification submitted to the AAO establish the beneficiary's required three years of prior work experience. Thus, the petitioner has established that the beneficiary meets

the job requirements of the proffered job as set forth on the labor certification. Thus the beneficiary is both eligible for the visa petition classification and meets the job requirements of the proffered job. The decision of the director with regard to the beneficiary's qualifications is withdrawn.

As stated previously, the petitioner has not established its ability to pay the proffered wage as of the priority date to the beneficiary and to any other beneficiaries with pending I-140 petitions. For this reason alone, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.